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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTIAN KENDRICK BAGSBY,

Defendant and Appellant.

B287471

(Los Angeles County
Super. Ct. No. BA448435)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Christian Bagsby was convicted by a jury of eight offenses arising from sexually assaulting Stephanie D. and Barbi R.; using a child as a hostage to prevent Los Angeles police officers from arresting him as he fled the scene of the sexual assaults; and physically resisting arrest. Specifically, Bagsby was convicted of assault with intent to commit a sexual offense on both Stephanie and Barbi (Pen. Code¹, § 220, subd. (a)(1)); sexual penetration of Stephanie by a foreign object (§ 289, subd. (a)(1)(A)); attempted sexual penetration of Barbi by a foreign object (§§ 289, subd. (a)(1)(A), & 664); misdemeanor battery of a child (§ 242); resisting an executive officer (§ 69); and two counts of resisting a peace officer (§ 148, subd. (a)(1)).²

The trial court stayed sentence on the assault conviction involving Stephanie and the attempted sexual penetration conviction involving Barbi pursuant to section 654. The court sentenced Bagsby to a total term of 14 years in prison for the remaining unstayed convictions; the sentence included concurrent terms for the section 69, misdemeanor battery, and resisting a peace officer convictions.

Bagsby appeals from the judgment of conviction, contending the assault convictions must be reversed because they are lesser included offenses of the sexual penetration and

¹ Further undesignated statutory references are to the Penal Code.

² In a bifurcated proceeding, the jury considered whether Bagsby was sane at the same he committed the above-described offenses. The jury found Bagsby sane. We omit the facts of the sanity phase because they are not relevant to Bagsby's claim on appeal.

attempted penetration convictions. Assault with intent to commit a sexual offense (§ 220, subd. (a)(1)) is not a lesser included offense of sexual penetration by a foreign object (§ 289, subd. (a)(1)(A)) under the statutory elements test applicable to Bagsby's claim. We affirm the judgment of conviction.

BACKGROUND

On July 14, 2016, about 5:30 p.m., Bagsby followed Stephanie and Barbi into the lobby of Barbi's apartment building. There, he grabbed Stephanie, put her into a chokehold, and threw her against a wall. She fell to the ground and Bagsby got on top of her. He bit her, and tried to pull down her leggings. She struggled, but Bagsby was able to put his fingers into her vagina through her leggings.

Barbi yanked on Bagsby's head to try to pull him off Stephanie. Bagsby turned his attention to Barbi, and got on top of her as she fell to the ground. Barbi's breasts became exposed and Bagsby scratched her chest and grabbed her breasts. He tried to put his hands into her pants, but ended up touching her vagina through her clothing. Bagsby banged Barbi's head on the floor.

A tenant, Michael L., came out of his apartment to investigate, saw Bagsby leaving, and followed him down the street. Michael called police, and flagged down a patrol car. When the officers in the patrol car approached on foot, Bagsby fled. As Bagsby ran, he grabbed a child who was crossing the street and put the child in a chokehold. The officers used force to free the child and subdue Bagsby. Bagsby continued to struggle, to resist being moved, and to slip out of restraints as he was taken to the hospital where he treated for a facial injury. He was then taken to jail for booking.

DISCUSSION

The trial court did not punish Bagsby for both assault and sexual penetration; it stayed the assault conviction involving Stephanie and the attempted sexual penetration conviction involving Barbi pursuant to section 654. In staying sentence on the two convictions, the trial agreed with Bagsby's argument that "there's no break in the action," finding there were not "separate acts" for the separate convictions. Bagsby maintains the trial court should have stricken the convictions rather than stayed them.

Bagsby claims "forcible digital penetration" cannot be committed without also committing "assault with the intent to commit forcible sexual penetration," making his assault convictions lesser included offenses of his sexual penetration convictions. He contends multiple convictions may not be based on lesser included offenses. Bagsby is describing the specific facts of his offenses—the accusation; those facts do not play a role in determining whether one offense is necessarily included in the other offense and so subject to the bar against multiple convictions for such offenses. Instead, for purposes of a multiple conviction analysis, it is the statutory elements of the offenses which determine whether section 240 is a lesser included offense of section 289.

"In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged." [Citations.] [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1226–1227.) There is a judicially created exception to this general rule permitting multiple convictions:

multiple convictions in the same proceeding may not be based on lesser included offenses. (*Id.* at p. 1227.)

“‘[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.’ [Citation.]” (*People v. Reed, supra*, 38 Cal.4th at p. 1227.) There are two categories of lesser included offenses but “‘only a statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding. An offense that may be a lesser included offense because of the specific nature of the accusatory pleading is not subject to the same bar.’ [Citation.]” (*Id.* at p. 1229.)

Considering only the elements of the two offenses at issue in the case, a defendant may commit sexual penetration in violation of section 289, subdivision (a)(1)(A) without also necessarily committing assault with the intent to commit a sexual offense in violation of section 220, subdivision (a)(1).

Section 220, subdivision (a)(1) requires an assault, which is statutorily defined as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240 [defining the general crime of assault].) The essential element of assault is the intent to use force against the victim. (See *People v. Leal* (2009) 180 Cal.App.4th 782, 793.)

In contrast, section 289, subdivision (a)(1)(A) provides: “Any person who commits an act of sexual penetration when the act is accomplished against the victim’s will by means of force, violence, *duress, menace, or fear* of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years.” (*Italics added.*) Subdivision (a)(1)(A) may be violated with verbal and psychological threats which coerce a victim into sexual

penetration against her will. (See *People v. Senior* (1992) 3 Cal.App.4th 765, 775 [defendant who exerted duress against daughter in form of psychological coercion such as threats to break up the family was properly convicted of violating § 289, subd. (a)(1)].) Thus, an attempt to commit a violent injury, or even a threat of violent injury is not required by section 289. Further, under section 289, the sexual penetration need not involve the victim. It is sufficient if the defendant causes another person to penetrate the defendant's "genital or anal opening for the purpose of sexual arousal, gratification, or abuse." (§ 289, subd. (k)(1).)

Because sexual penetration in violation of section 289, subdivision (a)(1)(A) can be committed strictly by psychological coercion, assault in violation of section 220, subdivision (a)(1) is not a lesser included offense of sexual penetration under the elements test. (See *People v. Leal, supra*, 180 Cal.App.4th at p. 793 [assault is not a lesser included offense of rape under § 261, subd. (a)(5) or sexual penetration under § 289, subd. (f) because those latter two offenses may be accomplished by deceit and thus without the use of force]; see also *People v. Parson* (2008) 44 Cal.4th 332, 349 [robbery may be committed by either force or fear, while assault requires force; because "robbery can be committed strictly by means of fear, assault is not a lesser included offense of robbery under the elements test."].)

DISPOSITION

The judgment is affirmed.

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STRATTON, J.

We concur:

BIGELOW, P. J.

RUBIN, J.*

* Presiding Justice of the Court of Appeal, Second Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.